United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1643

In The

United States Court of Appeals

for the Second Circuit

MAX S. GUMER,

Appellant,

vs.

SHEARSON, HAMMILL & CO., INCORPORATED,

Defendant-Appellee,

WINSLOW, COHU & STETSON, INC., FREDERICK S. NUSBAUM and THE NEW YORK STOCK EXCHANGE,

Defendants.

Appeal From The United States District Court For The Western District of New York

REPLY BRIEF FOR APPELLANT MAX S. GUMER

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POINT I

Violations of Regulation T

Shearson's argument to avoid liability for its Regulation T violations can be summed up in one sentence: Because it did not execute the trades which were in violation of §3 of the Regulation, it could not have violated the Regulation. In support of its argument Shearson brushes aside, without further comment, §7(b) of the Regulation as irrelevant, and then spends 10 pages (pp. 14-24) of its brief contorting §6(d)(1) out of its obvious meaning by introducing the totally extraneous concept of the SMA, and by attacking the rationale of the *Pearlstein* decision.

Shearson attacks the rationale of the *Pearlstein* decision by quoting the dissent in that case, illustrating not what *Pearlstein* stands for, but rather what *Pearlstein* does not stand for. In

urging this Court not to "expand" the application of *Pearlstein*, Shearson apparently forgets that *Pearlstein* is not a unique case. It is merely a good statement by this Court of the liability of a broker to a customer for Regulation T violations, a principle of law which has been consistently stated in a long line of cases both before and after *Pearlstein*, as cited in plaintiff's principal brief. *Pearlstein* merely restates, through a number of illustrations applicable to its facts, that any act or failure to act by a broker which continues or maintains a credit initially extended in violation of the Regulation will render the broker liable to his customer for loss sustained by the customer because of that illegal continuation or maintenance of credit.

Here we have a plaintiff into whose account was placed, first by illegal guarantee, and then by illegal consolidation, the credit of the PR & LG accounts which was initially extended in violation of §3(b) and never properly liquidated. That credit could not have been "maintained" by Winslow, the transferor broker, because it was never properly paid for. Moreover this conclusion is also mandated by §7(b) (quoted on page 13 of plaintiff's principal brief) which permits continued maintenance of a credit after the initial purchase. Either wittingly or unwittingly, Shearson, in its brief (at page 14) conveniently ignores the true meaning of that section, just as it apparently ignored it in its operations. Examination of that section shows that it is "permissive" *but* only conditionally permissive. It permits a broker to maintain credit despite reductions of market values of the securities in the general account *only* if the initial credit was extended without violation of §3. In other words, not until the initial purchases have been properly paid for can those securities be "maintained" for any purpose. Surely the transferor broker never received the "permission" conditionally granted by §7(b) to maintain that credit because that credit was initially extended in violation of the Regulation. Even Shearson recognizes that the transferor broker will have to respond in damages to the plaintiff for its violative continuation [see *Pearlstein*] and

maintenance [see §7(b)] of that credit: "If plaintiff's allegations are true he has his remedy against Winslow." (Page 20 of its brief.)

However, Shearson would have this Court believe that somehow in the transfer the violative credit was "cured" so that Shearson had no duty to liquidate and could avail itself, as transferee broker, of the "permission" granted by §7(b) to maintain that violative credit despite the fact that Shearson *knew* that the purchase credit had been initially extended in violation of the Regulation and despite the fact that when Shearson received plaintiff's general account, its net value was so low (even below the 25% margin requirement for NYSE purposes) that Shearson had to be relying upon the "permission" granted by §7(b) in order to accept and thereafter maintain the account. Clearly, with its knowledge of the credit violations, Shearson never obtained the "permission" of that section. To hold otherwise would allow an initial credit violation to be "cured" by simply transferring the credit to another broker where it would be treated as a simple maintenance situation. But if there ever was any doubt that a transferee broker could not be in a better position than a transferor broker with respect to "maintaining" a general account as permitted by §7(b), that doubt is totally removed when we read the phraseology of §6(d)(1) together with that of §3(b) and §7(b). Section 6(d)(1) imposes a duty of inquiry upon the transferee broker with respect to the validity of a customers initial purchases before the broker can permit maintenance of the account.

Section 6(d)(1) speaks so directly to the situation here — the conditions under which a transferee broker may "maintain" a "general account", and demonstrates Shearson's absolute disregard and violation of the section — that Shearson is compelled in its brief to resort to a diversionary tactic. The attempted defense to the obvious violation of §6(d)(1) is that that section, despite its own words, refers only to the technical SMA account. This, despite the fact that the section never

mentions SMA but specifically refers to the transfer of a *general account* (such as plaintiff's). It is difficult indeed for Shearson to explain the lack of reference to the SMA, which it argues is the raison d'etre of §6(d)(1), when §4(f) of the Regulation (authorizing and describing the SMA) so fully indicates that the Board knows how to refer to the SMA when it chooses to. Moreover, §6(d)(1) speaks of permissive maintenance in the same words used in §7(b) and never gives the slightest hint that it has to do with subsequent purchases after transfer. Trying to "hike up" its diversionary argument with legal authority, Shearson cites *Manevich* (p. 16 of its brief). Nowhere in the *Manevich* opinion is §6(d) mentioned and *Manevich* has nothing to do with transferring accounts. Although Judge Pollock's opinion in that case is interesting, it is clearly irrelevant. Shearson might well have cited the very recent case of *McCormick v. Esposito,* 500 F. 2d 620 (5th Cir. 1974) which contains an even better explanation of the SMA, but which also has nothing to do with §6(d) or transferring accounts; it is also interesting but irrelevant. The point that both cases make is that the SMA is an account which contains no securities at all and upon which no credit is or can be extended either for purchasing or for maintaining securities in *that* account; it is a technical account in which credit notations may be "stored" or "collected" and subsequently withdrawn so that a broker may permit initial purchases in the customer's general account, even though that account may not, by itself, contain the necessary purchasing power. However interesting the device, it is of no moment to this case.

Contrary to Shearson's position (expressed on page 18 of its brief), the language of §6(d)(1) "fits" perfectly the situation at bar. Using the words of both §3(b) and §7(b) this transfer section requires of a transferee broker that it satisfy itself by ". . . accepting in good faith a signed statement of the transferor that no cash or securities need be deposited in such account in connection with any transaction that has been effected in such

account . . ." before that broker may treat the account ". . . for the purposes of this part as if it had been maintained by the transferee from the date of its origin . . ." In other words, unless the transferee broker satisfies itself in good faith that the ". . . credit initially extended [was] without violation of this part . . ." the transferee may *not* maintain that credit.

Under the circumstances of this case, where Shearson *knew* of the initial credit violations and could not obtain the good faith statement, not only could Shearson not accept the violative credit (Count 6 of the Complaint) but immediately after accepting it, it also had the duty to liquidate so many of the securities as were in the account, the purchase credit for which had initially been extended in violation of §(3)(b) (Counts 6 and 8 of the Complaint). Clearly, the language of these three sections fits together much more easily when considering the duty of the transferee broker with respect to the propriety of "maintenance" under the permission of §7(b) than when considering the propriety of allowing additional purchases by use of credit in the SMA. It may be, as Shearson urges, that the transferee broker would be well advised to secure the good faith statement if he were to allow subsequent purchases; that is not because the language "fits" that situation so well, it is because the broker must satisfy himself of the propriety of an account when he accepts it for any purpose. Thus the transferee broker is mandated to secure the statement and to assure itself of the propriety of the initial credit in the general account if that broker wishes to be able to treat the account as its own from the beginning, i.e. if it wishes to treat the account ". . . as if it had been maintained by the transferee from the date of its origin . . ."

Shearson's fear that casting a liquidation burden upon a transferee broker would be too onerous and ". . . at odds with common sense . . ." (page 20 of its brief) is obviously unfounded. According to §6(d)(1) that burden would not fall to any transferee broker which "accepts in good faith a signed

statement of the transferor that no cash or securities need be deposited . . ." Plaintiff submits that this is simply not too much to ask, especially when it is mandated by the Regulation. A broker who violates this mandate ought to be as liable to this plaintiff as the offending broker was to the plaintiff in *Pearlstein.*

Last, defendant makes much of the change in law (page 22 of Shearson's brief) which gave rise to Regulation X (fn, page 11, plaintiff's brief). It is now clearly declared public policy that the provisions of Regulation T shall apply equally to broker and customer alike. Therefore, a customer who commits an act which, if committed by a broker, would be violative of Regulation T, would be violating Regulation X and would be prohibited from maintaining an action to recover his loss. If that is desirable public policy, then §6(d)(1) must be given the interpretation urged by the plaintiff. If neither §6(d)(1) nor *Pearlstein* casts a burden upon Shearson to insure that it is not illegally "continuing" a violative credit, then neither can cast any burden upon a customer who, with adroit timing, could easily effect purchases on credit with one broker and, before the five day liquidation period had expired, could transfer his general account to another broker who would re-finance it at the considerably higher margin permitted by NYSE Rule 431. The transferor broker would be relieved of the mandate of §3(e) and, if §§6(d)(1) and 7(b) of the Regulation mean what Shearson says they mean, the transferee broker would have no obligation, indeed no reason, to enforce §3 of the Regulation. In effect, by adroit transfers a customer could make purchases on the basis of "stock exchange margin credit" alone — 25% — fully one-half of the lowest possible level which the Board is authorized to set as the lowest initial purchase margin requirement. There can be no doubt that the Board did not intend to allow either a broker or a customer, or both acting together, to so easily circumvent the purchase margin requirements of the Regulation.

POINT II

Violations of Rule 405

Shearson's brief attempts on two grounds to refute the plaintiff's allegation of implied liability under NYSE Rule 405; the first based on the theory of law and the second on the facts alleged.

The Status of Rule 405 under the *Colonial* analysis

Defendant asserts that the case of *Landy v. Federal Deposit Insurance Corporation*, 486 F.2d 139, (3rd Cir. 1973) cert. denied, ——U.S.—— (1974) "held" as a general proposition that violations of Rule 405 are not the subject of a private action (see Defendant's brief at p. 25). This conclusion is wholly unwarranted and erroneous.

The *Landy* case holds:

> Given the present posture of this case, we *need not* and therefore *do not* express any view as to whether federal causes of action should be implied for violation of stock exchange rules, or, if such causes of action should be imposed in some instances, what standard should be used to determine whether the specific alleged rule violation gives rise to the cause of action. [emphasis added] id at 166.

The subsequent *Landy* court comments on Rule 405 are clearly dicta, a condition which the Third Circuit could not have emphasized more than by the words it used in the above-quoted holding. As part of this dicta the *Landy* Court suggests that the *Buttrey* Court may have strayed from a strict interpretation of *Colonial* (*Landy* at 165).

Plaintiff contends that the *Colonial* analysis as applied by the *Buttrey* Court to Rule 405 is correct. *Buttrey* cites Sections 6 and 19 of the 1934 Act as its authority for implying liability under that Act (*Buttrey v. Merrill Lynch, Pierce, Fenner &*

Smith, Inc., 410 F.2d) 135 (7th Cir. 1969.), at pp. 141-142.) The *Buttrey* Court's use of the words "investor protection" as a "touchstone" for actionability is, despite the Third Circuit's doubts in *Landy*, fully sanctioned by Section 6(d) of the 1934 Act which requires an exchange's rules be "just and adequate to insure fair dealings and to *protect investors*". It would seem that the Third Circuit's real problem with *Buttrey* lies in its use of Section 6(d) of the 1934 Act as the source of incorporation of an exchange rule into the federal scheme of regulation. If there were any doubt that Section 6(d) is appropriate for incorporating rules of an exchange into the Federal scheme of securities regulation it is laid to rest in the recent case of *Merrill Lynch, Pierce, Fenner and Smith v. Ware*, 414 U.S. 117 (1973). In *Ware* Mr. Justice Blackmun, writing for a unanimous court (Justice Stewart not participating), examined whether there existed a conflict between state and federal law when a rule of the NYSE conflicted with a California law. The underlying question of federal preemption was resolved by determining if the particular stock exchange rule was part of the scheme of regulation of Securities Act of 1934 (See *Ware*, discussion at pp. 130-31), the same test as the primary *Colonial* test for liability. In examining this question the Supreme Court concluded that a stock exchange rule could be established to be part of the regulatory scheme and incorporated into the 1934 Act by virtue of either Section 19(b) *or* Section 6(d) of the 1934 Act. *id* at 134-35. Justice Blackmun concludes that the subject rule in *Ware* was not promulgated under Section 6(d) or 19(b) and, therefore, relegates that particular rule to "... an exchange's *housekeeping* affairs ...". (*id* at 136) while at the same time pointing out two other rules for contrast which, in the Court's opinion, are quoting the language of Section 6(d), "... designed to insure fair dealing and to protect investors" and therefore incorporated as part of the federal regulatory scheme (*id*).

Plaintiff submits that the Supreme Court's analysis in *Ware* for incorporation into the federal scheme for the purposes of preemption is very much the same standard as this Court's standard for the threshold determination of actionability under the *Colonial* analysis, and that Section 6(d) of the 1934 Act is a proper basis for incorporating Rule 405 as part of the federal securities regulatory scheme.

The *Colonial* analysis also requires the establishment of a duty unknown at common law. That the content of Rule 405 is unknown at Common Law is beyond question; the rule being the quintessence of "caveat vendor" — the securities law negation of the common law maxim of "caveat emptor". Thus, the full *Colonial* analysis — part of the scheme of federal regulation and a duty unknown at common law — is satisfied by Rule 405. The recent case of *Starkman v. Seroussi*, 377 F. Supp. 518 (S.D.N.Y. 1974) reaches this same conclusion, independent of any reliance on *Buttrey* or *Ware* stating:

> So, too, Rule 405, here alleged to have been violated by Shearson, is precise and has among its purposes protection of the customer qua customer. The rules here allegedly violated may be considered "an integral part in SEC regulation" [citing *Colonial*] in furtherance of the purpose declared in Section 6(d) to "insure fair dealing and to protect investors". *id.* at p. 524.

Accordingly, the *Buttrey* Court holding that Rule 405 is "for the protection of investors" is controlling; fully supported by the Supreme Court in *Ware;* consistent with the *Colonial* analysis promulgated by this Court; and should be applied in the instant case.

Allegation of Facts Tantamount to Fraud

Shearson's second attempt on Plaintiff's Point II consists in the assertion the instant facts alleged are not "tantamount to fraud" as in *Buttrey* but mere bootstrap uses of other violations of rules and regulations which defendant then characterizes as

"technical". Shearson makes this argument without ever analyzing what is meant by the use of the phrase "facts tantamount to fraud".

In *Buttrey* the phrase "facts tantamount to fraud" means a knowing or willful violation or reckless disregard for the truth — i.e. scienter or its equivalent — a conclusion fully supported by *Buttrey's* citation of *Hecht v. Harris Upham & Co.* (*Buttrey* at p. 143), which case contrasts "fraud" with "mere negligence or errors of judgment." This is the basis for *Buttrey's* statement that it does not hold ". . . an alleged violation of Rule 405 *per se* actionable." (*id* at 142). Thus, facts constituting fraud are alleged when a plaintiff sets forth a duty owed by defendant to him and alleges facts showing this duty has been ignored or miscarried either knowingly or through reckless disregard. See *Lanza v. Drexel & Co.*, 479 F.2d 1277, 1306 (2d Cir. 1973) and *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.* 480 F. 2d 341, 363. This plaintiff has clearly done in its factual allegations for the violations of the sundry provisions of Regulation T and the requirements of Rule 431. Even if those violations are determined not to be themselves the basis for a private action, nevertheless both the facts underlying those violations and the existence of the violations support a knowing or reckless disregard in fulfilling the duty imposed by Rule 405. It is not just the violations of these other rules but also the facts alleged as constituting those violations which are the basis of the violation of Rule 405. Thus, the alleged violations of Rule 405 do *not* depend, as Shearson insists, upon a court holding that there are other *actionable* violations of Regulation T or stock exchange rules.

Viewed from another point, Shearson's position is little more than an assertion that a given set of facts cannot support more than one cause of action (see also the treatment of this assertion under Point IV). The *Starkman* plaintiff, like the instant plaintiff, also alleged facts which supported the violation of a variety of NYSE rules and specific statutory sections. Shearson,

also a defendant in that case, cried "bootstrap". The *Starkman* Court in sustaining the complaint as stating a cause of action under Rule 405 rejected Shearson's bootstrap argument as follows:

> Plaintiff's allegations, which specify the details of violations of the Stock Exchange rules by defendants are by no means "immaterial" or "insubstantial" and upon their face are sufficient to confer jurisdiction under Section 27 of the Exchange Act *Starkman*, at 524.

The facts alleged in the instant case are such that Shearson is faced with an almost Hobbesian choice of having violated the duty under either subsection (1) or subsection (2) of Rule 405 — a choice whose very existence reveals and demonstrates the crassness of Shearson's violation of that Rule and its culpability for that violation. Certainly if a *broker* has a duty under Rule 405 *to third parties*, not his customer, to discern and report his customer's fraud on them and refrain from aiding the customer by opening an account (see *Buttrey*); then indeed, Shearson must have a much heavier obligation under Rule 405 to Gumer who was its customer to report the fraud of a third party (Winslow et al) on him and to refrain from opening an account when it knew and had the basis for knowing that its actions would assist in the perpetration and concealment of that third party's fraud. Plaintiff has alleged facts in its complaint supporting a violation of Rule 405, all in full accord with the requirements of *Colonial*, *Buttrey* and *Starkman*.

Therefore, since Rule 405 may be actionable under the 1934 Act and since plaintiff has alleged facts demonstrating a violation of that Rule together with facts demonstrating knowing conduct or a reckless disregard for the truth the decision of the District Court should be reversed on this Point.

POINT III

Violations of Rule 431

Under Point III in its principal brief, plaintiff has applied the *Colonial* analysis to Rule 431 and demonstrated that (1) under Section 19b(12) the subject matter of Rule 431 was specifically committed to federal regulation under the overview of the SEC (plaintiff's principal brief at pp. 24-25), (2) the duty imposed by Rule 431 is unknown at common law (plaintiff's principal brief at p. 26), and (3) the complaint has pleaded facts showing this alleged violation by Shearson was knowing or perpetrated with gross disregard for the information available, the rules' requirements, and the effect of that conduct on Plaintiff's account (plaintiff's principal brief at pp. 26-27).

Ignoring all of this and ignoring the language of *Colonial*, Shearson has responded that (a) Plaintiff has failed to show that Rule 431 is consistent with the federal regulatory scheme, (b) Plaintiff fails to show how Rule 431 falls within the purposes of the federal securities law, and finally (c) plaintiff fails to distinguish Rule 431 from other rules, etc. which are not actionable (see defendant's brief at p. 29).

Plaintiff's rejoinder consists in a reaffirmation of the *uncontested* principle point in its argument — the incorporation of Rule 431 into the federal regulatory scheme under Section 19(b)(12) of the 1934 Act. In discussing another subsection of Section 19(b) this Court in the recent case of *Gordon v. the New York Stock Exchange, Inc.*, 498 F.2d 1303, (2nd Cir. 1974) defines the position of a rule covered by Section 19(b) and effectively obviates all three of defendant's arguments. In that case this Court quoted Section 19(b) and subsection (9) thereof (concerning fixing commissions) and held as follows [bracketed material added]:

> It is clear from this language [Section 19(b)] that the "congressional aim in supervised self-regulation is to insure fair dealing and to protect investors from harmful

or unfair trade practices," *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 130 (1973). It is equally plain that Congress considered the "fixing of reasonable rates of commission" [read "(12) minimum deposits on margin accounts"] to be essential to meeting these goals, for it listed this factor explicitly among the twelve items so denominated. Finally, and most importantly for this jurisdictional dispute between an antitrust court and the SEC, Congress vested in the Commission the power to determine whether changes are "necessary" in the exchanges' rate-fixing [read "maintenance margin"] practices to assure fulfillment of the goals of the Act. *Accordingly, Congress defined in §19(b) those aims fundamental to achieving "the aims of the Securities Exchange Act," Silver v. New York Stock Exchange 373 U.S. at 361, and accorded the SEC the authority to make whatever changes respecting those matters are "necessary or appropriate" (§19(b)) to effectuate those aims — i.e.*, in the terms of the *Silver* test, "*necessary to make the Securities Exchange Act work." 373 U.S. at 357.*

If the discussion in *Silver* of a *core of exchange self-regulation necessary to make the 1934 Act work . . . is to be given any meaningful application, we are of the view that it must have reference to the practices enumerated in §19(b)*, and in this instance to the fixing of reasonable rates of commission [read (12) "minimum deposits on margin"]. (emphasis and bracketed material added). id. at p. 1306.

The emphasized portions of this Court's discussion of 19(b) indicates that each of that section's twelve subsections are consistent with the federal regulatory scheme, fulfill the purposes ("aims") of the federal securities act and finally that rules promulgated concerning matters dealt with by the twelve subsections of 19(b) are ipso facto of greater importance than all other exchange rules in fulfilling those aims and purposes and therefore justify jurisdiction; — indeed Section 19(b) is the "core . . . necessary to make the 1934 Act work" (see *Gordon* quoted above). *Gordon* amply answers all three objections

which Shearson has presented on page 29 of its brief as its own summary of its argument under this Point.

Defendant complains that Rule 431 antedates the 1934 Act and that the SEC has never exercised any authority over that Rule. Here again Shearson's problem is a refusal to face the language of Section 19(b) which clearly recognizes many of such rules pre-exist its enactment and in fact limits the SEC to *changing* existing rules (See Section 19(b)). The initiative under Section 19(b) is first left to the exchange. The Commission acts only to fill a vacuum created by a failure of exchange response or to change an unacceptable rule. Thus, Shearson's complaint that the SEC has not requested any changes in Rule 431 actually strengthens Plaintiff's argument since it demonstrates that Rule's present acceptability to the SEC "for the protection of investors" (Section 19(b)) within the regulatory scheme. Indeed *Colonial* itself recognizes that the SEC need not actually exercise authority over a Rule to have it form part of the regulatory scheme and be the basis for an implied cause of action.

> A particular stock exchange rule could thus play an integral part in SEC regulation *notwithstanding* the Commission's decision to take a back-seat role in its promulgation and enforcement . . . [emphasis added] *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 182 (2d Cir. 1966)

Defendant constantly confuses the "purpose of a rule" with the type of conduct which makes a violation thereof actionable. Thus Shearson requires that Rule 431 must be directed at fraud, citing the *District Court* case of *Shemtob v. Shearson, Hammill and Co., Inc.*, CCH Fed. Sec. L. Rept. ¶ 93,036 (S.D.N.Y. 1971), which case in turn cites both *Hecht* and *Mercury Investment Company* all as set forth on page 30 of defendant's brief. The decision of the District Court in *Shemtob* insofar as it covers Rule 431 can only be deemed to hold that a violation of Rule 431 is *not per se* actionable —

scienter or its equivalent must be alleged. Indeed the *Hecht* quotation relied upon by both *Mercury* and the District Court in *Shemtob* demonstrates that this is the fatally missing element:

> . . . the Securities Acts . . . are essentially directed *at fraud* — not against mere negligence or errors of judgment *on the part of the broker* [emphasis added] *Hecht v. Harris Upham & Co.*, 283 F.Supp. 417, 430 (N.D. Cal. 1968)

Thus, it is *not* a requirement under District Court *Shemtob* that the Rule itself be directed at fraud, as Shearson erroneously concludes (defendant's brief at p. 30), but that there be allegations that the violation thereof by the broker was made willfully or with reckless disregard for the truth. Plaintiff's complaint demonstrates at length that he has alleged scienter or its equivalent — facts which show far more than "mere negligence or error of judgment" in the violation of Rule 431. (See also discussion in plaintiff's principal brief at pages 26-27.)

Shearson has not in any way indicated any argument which refutes the incorporation of Rule 431 under Section 19(b)(12) as part of the regulatory scheme, does not present this Court with any case which negates the clear language of *Gordon* covering Section 19(b) (see also *Ware* discussed under Point II *supra*), and ignores wholly the allegations in Paragraph 46, 48, 51, 53, 54-63, 66 and 67 of the Complaint which set forth the details of the various violations of this rule and willful or reckless disregard for the application of the rule. Defendant's sole argument is based upon a misconstruction of the word *fraud* as used in District Court *Shemtob* and the cases cited therein together with a citation from *Colonial* as to policy which only applies if a rule fails to meet the tests set forth in *Colonial.*

Plaintiff has carried its burden under *Colonial* and demonstrated that a violation of Rule 431 may be actionable; the complaint alleges facts constituting a violation of that Rule; it also alleges facts constituting a scienter element — knowledge or gross reckless disregard for the truth; and plaintiff is, there-

fore, entitled to a reversal of the District Court's decision in the instant case on this Point.

POINT IV

Violations of Rule 10b-5

Count Six

Under Count 6 Shearson's brief poses three questions: (a) whether "*consolidation" and "transfer"* alone or in combination touch upon a purchase or sale of securities; (b) whether facts underlying violations of stock exchange rules and those violations themselves can constitute a scheme to defraud, and whether failure to disclose such facts and violations is a material omission; and (c) whether defendant is an aider and abettor under the facts asserted.

Both "consolidation" and "transfer" involve a "purchase or sale of securities".

Plaintiff has asserted the "economic reality" underlying these concepts on Page 30 of its principal brief. There can be no doubt that a *consolidation* involves a purchase or sale of securities — indeed it is a situation involving *both a purchase and a sale*. Lest there be any doubt the NYSE conclusively settles this issue of "economic reality" defining a consolidation in this way:

> When securities are transferred from one account to another in an office for a valuable consideration, *the transaction constitutes a purchase and sale* within the meaning of the Constitution *and a buying and selling commission* shall be charged.
>
> A valuable consideration includes, but is not limited to (1) a credit to the transferor's account and/or debit to the transferee's account, or (2) a receipt for the transferor's account of another security and a delivery of such security from the transferee's account.

> To avoid possible misunderstanding, the Exchange suggests that a client contemplating such a transfer be apprised of these rulings prior to effecting the transaction.
>
> If a member or member organization is in doubt as to the necessity of charging a commission or feels that the circumstances surrounding a certain transaction warrant an exception to the above requirement, complete details covering each such transaction should be submitted to the Department of Member Firms. Rule 381.12, CCH NYSE Guide, Vol. 2 at ¶ 2381.12 (emphasis added).

Plaintiff has alleged the necessity of the waiver of those commissions in paragraph 49 of its complaint.

That a *transfer of a margin account* between brokerage houses involves a purchase and sale of securities is equally clear. A margin account is a loan secured by a pledge of securities — which by definition constitutes the "*acquisition*" and "*disposition*" for value of an "*interest in securities*" (see definitions under the 1934 Act of "purchase". §3(a)(13); "sale" — §3(a)(4); and "security" — §3(a)(10)). A transfer of a margin account is the close out of one pledge and the opening of another pledge. Again, lest there be any doubt caused by Shearson's claim that this is a "flight of fancy" or a "fiction" (defendant's brief at p. 34) we refer the Court to its landmark decision in *SEC v. Guild Films Co., Inc.*, 279 F.2d 485, 490 (2d Cir. 1960) cert. den., 364 U.S. 819 (1960) sub. nom. *Santa Monica Bank v. S.E.C.* and to a summary of the SEC's brief in *SEC. v. National Bankers Life Insurance Co., et al* set forth in CCH Fed. Sec. L. Rept. '72-'73 Transfer Binder at ¶ 93,738:

> *A pledge is included in the definition of the term "sale" under both the Securities Act and the Exchange Act,* the Commission argues. In consideration of a loan, a pledgor transfers to a pledgee a legally enforceable interest in the pledged securities, thereby effecting a sale. *The broad statutory purpose of assuring fairness*

and honesty in securities transactions requires that the protection afforded by the antifraud provisions be available where fraudulent conduct occurs in the pledging of securities, states the SEC. A pledgee assumes a very real investment risk with respect to the pledged securities. The essence of such a transaction is the shifting of part of the risk assumed by the pledgee when he makes the loan (the risk of non-payment) from a risk entirely dependent on the solvency of the borrower to an investment risk associated with the continuing value of the pledged securities.

As indicated in plaintiff's brief at pages 30-31 (covering ¶ 43, 45, 46, 50 and 53 of the Complaint) there has been alleged a continuing "*single scheme to consolidate and transfer*" improper accounts and Shearson's "knowing acceptance" was an essential element in the accomplishment of that objective. Since, in fact, "consolidation" and "transfer and acceptance" each clearly involve both a purchase and sale of securities, there can be no doubt that plaintiff has alleged a scheme to defraud "touching its [purchases] sales of securities as an investor" -the test laid down by the Supreme Court in *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12-13 (1971).

Facts constituting a violation of Regulation T and Stock Exchange Rules may also be the basis for a cause of action under Rule 10b-5

Shearson has stated that the allegation of *failure to disclose and concealment* of prior violations of regulations, rules and facts constituting such violations and concealment of the scheme to defraud (i.e., "consolidate and transfer improper accounts") is a bootstrap theory. Defendant states in summary: "Violations of these Rules either are or are not actionable on their own. The pleading of a violation of SEC Rule 10b-5 adds nothing to plaintiff's argument." (defendant's brief at p. 36). As under

Point II Shearson asks this Court to rule that facts constituting a violation of an exchange rule or Regulation T, as well as such violations themselves, cannot under any circumstances also constitute a violation of any other statutory section or rule. A brief scanning of this argument in Shearson's brief demonstrates that it has neither citation nor even policy reason for this strange proposition.

In the recent case of *Securities and Exchange Commission v. Packer, Wilbur & Co., Inc.* 498 F.2d 978 (2d Cir. 1974) this Court recognized that the same set of facts supporting a violation of Regulation T could also support a 10b-5 violation:

> We cannot believe that Congress intended that an active and sophisticated securities investor such as Arenstein, who deliberately engaged in a margin violation [misrepresenting his intent to pay], should enjoy the benefits of SIPA.
>
> The findings of the district court, furthermore, place Arenstein's fraudulent conduct [misrepresenting his intent to pay] squarely within the proscription of §19(b) and Rule 10b-5 of the Securities Exchange Act of 1934 [bracketed material added]. *id.* at 984-985.

And at another point in a footnote the Court in *Packer, Wilbur* states:

> The case of a customer who intentionally misrepresents his intention to his broker is different. *He violates Regulation X, 12 CFR 9224.1 and Rule 10b-5 by making this representation* (emphasis added). *id.* at 983, footnote 7.

With respect to facts constituting violations of exchange rules, we have already noted the *Starkman* case which rejects the same bootstrap contention of this self-same defendant (See Point II above). Indeed *Buttrey* itself found the same set of facts supporting a violation of Rule 405 also constituted a violation of 10-5 (*Buttrey, supra,* at 143-144).

With respect to the *violations of Regulation T*, both by Winslow and by Shearson, and the *violations of exchange rules*, again both by Winslow and Shearson, defendant Shearson committed yet another violation of Rule 10b-5 by not disclosing them to Plaintiff. Shearson had a special relationship with the Plaintiff which created an "affirmative duty of disclosure" (see *ChrisCraft Industries, Inc. v. Piper Aircraft Corp., supra*, at 363). This fiduciary relationship, this affirmative duty required Shearson

> . . . to disclose fully those material facts about which the [investor] is presumably uninformed and which would, in reasonable anticipation, affect his judgment'. [cite omitted], *id.* at 363.
>
> A knowing or reckless failure to discharge these obligations constitutes sufficiently culpable conduct to justify a judgment under 10b-5. *id.* at 363.

Clearly, the Plaintiff has alleged under Count 6 duties knowingly or recklessly violated, all of which together, despite separate accountability, formed a part of a single scheme on the part of Winslow and Shearson to "consolidate and transfer improper accounts"; and further Plaintiff has alleged that Shearson knowingly concealed this scheme and the constituent violations, which concealment was itself in violation of an affirmative duty of disclosure.

Plaintiff has fully pleaded facts constituting aiding and abetting.

Shearson has attempted to obviate liability as an aider and abettor by reference to two points. Defendant Shearson asserts that the concept is inapplicable if a defendant merely fails to act, citing Professor Ruder's article *Multiple Defendants* in Securities Law Fraud Cases and that the alleged knowing "acceptance of the account is not an act which aided and abetted Winslow" (see defendant's brief at p. 38).

Both of these points are laid to rest by Professor Ruder himself in an extremely recent update of the article cited by Shearson in its brief. The new article, Ruder, *Aiding and Abetting*, The Review of Securities Regulation, Vol. 7, p. 882, (September 4, 1974), analyzes the cases since his first writing and notes some entirely new conclusions. It is Professor Ruder's position that the line between primary wrongdoers and aider and abettor in a 10b-5 action is frequently very fine, particularly, his analysis notes, in the Second Circuit cases (*id.* at 884-885). Further, his new analysis concludes that inaction will be held to constitute aiding and abetting *if* there exists an independent duty of inquiry from which there automatically flows a concomitant duty to disclose. The new Ruder test for aiding and abetting is set forth as follows:

> (1) Did an independent wrong exist?
>
> (2) Did the defendant know of the wrong or would he have discovered it had he fulfilled his duty of inquiry?
>
> (3) Assuming that the defendant knew of the wrong or would have discovered it had he fulfilled his duty of inquiry, did he give substantial assistance to the wrongdoing or did he breach his duty to take action? *id.* at 885.

The application of this test to the allegations of the instant complaint is immediately apparent.

The Plaintiff has alleged a "scheme to consolidate and transfer" (¶ 43 of the complaint) which at a minimum establishes an independent wrong under requirement (1) of the test.

Plaintiff has alleged Shearson's actual knowledge of the wrong (¶ 46, 47, 50 and 53 of the complaint) and further alleged that Shearson had an independent duty of inquiry under Regulation T 6(d)(1) (See Point I of plaintiff's principal brief); another duty of inquiry under Rule 405 (see Point II of plaintiff's principal brief); and yet another duty of inquiry in

order to carry out the requirements of Rule 431 (see Point III of plaintiff's principal brief). Clearly requirement (2) of the new aider-abettor test is fulfilled.

Plaintiff has alleged a *single scheme to consolidate and transfer* (see ¶ 43, 45, 46, 47, 50 and 53 of plaintiff's complaint and the discussion in plaintiff's principal brief at p. 30-31). Plaintiff contends that the alleged "acceptance" by Shearson was an essential element since the "transfer" could not be accomplished without that "acceptance". This is substantial assistance under both requirement (3) of the new Ruder aiding and abetting test and, indeed, under any prior aiding and abetting test. However, even assuming Shearson's argument that "acceptance" was not substantial assistance, requirement (3) is nevertheless fulfilled by defendant Shearson's breach of a duty to act on its obligation to disclose all of Winslow's violations which obligation is predicated upon its various independent duties of inquiry set forth under requirement (2) above.

> . . . to invoke such a rule [aiding and abetting by inaction] investors must show that the party charged with aiding and abetting had knowledge of or, but for a breach of duty of inquiry, should have had knowledge of the fraud, and that possessing such knowledge the party failed to act due to an improper motive or breach of a duty of disclosure. *Hochfelder v. Midwest Stock Exchange*, CCH Fed. Sec. L. Rep., ¶ 94, 499 at 95, 756 (7th Cir. 1974).

This same duty to disclose if predicated upon a special fiduciary relationship rather than just a stock exchange rule also establishes *primary* participation in the scheme (see discussion at p. 20 *supra.*)

Thus Defendant Shearson aided and abetted the earlier violations of Regulation T by Winslow and the "scheme to consolidate and transfer" *by both its actions and its failure to disclose.* Plaintiff has alleged and shown its guarantee to Winslow was fraudulently acquired and in any event does not

cure these violations (see discussion at p. 14 of plaintiff's principal brief). If there is any question of Shearson's culpability, it is assuredly resolved for purposes of this motion by the same allegations of actual knowledge and/or by allegations of fact supporting breaches of this series of separate duties of inquiry under the various rules and regulations set forth above.

Count Ten

Shearson challenges Plaintiff's Count 10 relying on three points — (a) a purported analogy to the *Colonial* case, (b) a continued assertion under this Count that the same facts cannot support more than a single cause of action, and (c) the purported application of the *Shemtob* case to one 10b-5 violation.

The *Colonial* analogy

Defendant's purported analogy between *Colonial* and the instant case will not stand the test of even casual scrutiny. The plaintiff in *Colonial* did not allege a 10b-5 violation; nor did he allege a violation of a duty imposed by Rule 431, nor did he allege any representation of compliance with Rule 431. *Colonial* was purely and simply a "house margin" case. The *Colonial* court held that the alleged violation of rules which merely establish an ethical standard were not actionable. Defendant Shearson's summary of and citations from *Colonial* at p. 39 of its brief reweaves Judge Friendley's decision in that case into a 10b-5 decision as part of its continued attempt to trade upon phrases such "statutory watchword" and "garden variety". While those phrases have a clear meaning in the context of a rule imposing only an ethical duty, Shearson's wrenching miscitation has reduced them to so many buzz words. Defendant argues neither from logic nor from the cases but rather by characterization. *Colonial* does not contain any holding respecting the

duties imposed by Rule 431 or Rule 10b-5 or representations in connection with Rule 431, the duties and representations under discussion in Count 10 (see *Wolfson and Russo*, The Stock Exchange Member: Liability for Violation of Stock Exchange Rules, 58 Cal. L.R. 1120 at 1140-41, particularly footnote 99, 1970). Judge Friendley's comments quoted by Shearson are applicable only to facts set forth in the paragraphs from which they have been inexplicably divorced by Shearson's citation.

The allegations support multiple causes of action both under state law and under Rule 10b-5 and scienter.

Shearson argues that Paragraph 73 under Count 10 merely repeats and realleges facts either set forth under Count 7 in Negligence or which are in turn realleged under Count 11 in Breach of Contract and that, therefore, such facts cannot support a 10b-5 argument under Count 10. On this basis Shearson summarily dismisses the 19 paragraphs realleged in Paragraph 73 and concludes that the "crux" of Count 10 can be only in Paragraph 74. Shearson's logic is bewildering at best. This is but another attempt in a series to convince this Court that a single set of facts cannot support more than one cause of action. As indicated above under Point II and III above, this argument is utterly without legal foundation and in fact runs counter to the decisions in a number of cases. (See p.19, *supra*). If there is any doubt that it is permissible to plead the same facts in negligence and breach of contract for state law purposes as well as under Rule 10b-5 for federal purposes, the United States Supreme Court in *Superintendent of Insurance* has held:

> Since there was a "sale" of a security and since fraud was used "in connection with" it, *there is redress under §10(b), whatever might be available as a remedy under state law.* (emphasis added) 404 U.S. at 12

Under Count 10 the complaint has alleged violations of Rule 10b-5 by Shearson on two separate occasions; the first in September 1969 when the account was opened (see ¶ ¶ 48, 51,

56 and 52 together with pages 32-33 of plaintiff's principal brief); and the second in February-May 1970 (see ¶ 57, 58, 59, 60, 66 and 74 together with page 34 of plaintiff's principal brief). Shearson's brief totally ignores the September 1969 violations and is erroneous in its analysis of what has been alleged in support of the February-May 1970 violations.

Shearson began its discussion of Rule 10b-5 with reference to the requirement of Rule 9(b) of the Federal Rules of Civil Procedure that the "... circumstances constituting fraud shall be stated with particularity ..." and meets itself again under Paragraph 74 in its assertion that there is no allegation of fact indicating scienter in that Paragraph 74. Shearson would have had no problem with the allegations of scienter under Count 10 if only it had completed its quotation from Rule 9(b). Rule 9(b) is quite clear in distinguishing the requirement for allegations of events from allegations of state of mind (scienter).

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. *Malice, intent, knowledge, and other condition of mind of a person may be averred generally.* (emphasis added) Fed. Rules Civ. Proc. rule 9(b), 28 U.S.C.A.

Moores states that this requirement means a plaintiff must set forth

> ... the time, place and content of the false representation, the fact misrepresented and what was obtained or given up as a consequence of the fraud. 2A Moores Federal Practice, ¶ 9.03 at pp. 1927-28 (2d ed. 1974)

Shearson attempts to neatly ignore the information in the 19 Paragraphs realleged under Paragraph 73 which set forth time, place, content, etc. Similarly, Shearson refuses to believe that those portions of Paragraph 74 stating that Shearson "... *knew or should have known*" of the improper maintenance and that it "*made the contrary representations knowingly or recklessly without knowing if they were true* ..." constitute averments sufficient under the emphasized portion of Rule 9(b) quoted

above. The discussion at pages 36-38 of plaintiff's principal brief makes it clear that the complaint read as a whole (including the 19 paragraphs realleged under ¶ 73) not only meets the requirements of Rule 9(b) but also this court's scienter requirements as enunciated in *Heit v. Weitzen, Lanza v. Drexel & Co.* and *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.* (see plaintiff's principal brief at pp. 36-7).

The *Shemtob* Case

Defendant Shearson spends some four pages of its brief citing from both the District Court and Appellate Court *Shemtob* cases. Plaintiff wishes to point out in the first instance that the *Shemtob* case has no bearing on the 10b-5 causes of action stated under Count 6 or the September 1969 10b-5 cause of action stated under Count 10. Indeed Shearson's brief makes no mention whatsoever of these other 10b-5 violations in connection with *Shemtob*. The *Shemtob* case, if applicable at all, refers only to what Plaintiff has described above as the February-May 1970 10b-5 violations.

Defendant Shearson does not compare the facts of *Shemtob* to those of the instant case in the February-May 1970 violations but rather seems content to conclude without analysis that they are the same. Such lengthy citations of *Shemtob* without this comparison are meaningless.

In the *Shemtob* case the relevant facts occurred within a very short time frame, all as set forth in Paragraphs 17, 18 and 19 of the *Shemtob* Complaint. Judge Mansfield emphasized this point in his opinion and made it the basis of the Court's decision.

> The sufficiency of the complaint in the present case [Shemtob], and the existence of federal jurisdiction concern alleged improper representation made to Plaintiff which are found in ¶ ¶ 17, 18 and 19.[3] [bracketed material added — Footnote 3 sets forth those Paragraphs of Shemtob's complaint] *Shemtob v.*

Shearson, Hammill and Co., 448 F.2d 442, 445 (2d Cir. 1971)

The *Shemtob* allegations make it clear that the Shemtobs were fully advised of the status of their account, knew that margin was needed to meet the ". . . requirements of the NYSE and of this firm," and nevertheless determined ". . . to ride the market down." (*Shemtob* at p. 445, footnote 3).

Plaintiff Gumer never was advised on the status of his account until it was at 4% and being liquidated. Plaintiff Gumer made no determination that he was willing to "ride the market down" rather than preserve his substantial equity. *Shearson made these decisions for him.* Nothing could be more different from the *Shemtob* facts. The Shemtobs acted with knowledge communicated by Shearson. Plaintiff Gumer was denied any knowledge of the true status of his account and was even denied account statements. Indeed during the period February-May 1970 Shearson not only did not advise him of his account's actual condition, Shearson even represented it was correctly making calculations when they were not, and that the account complied with Rule 431 when it did not (see plaintiff's complaint at ¶ ¶ 57-60 and 74).

In *Shemtob* there is no allegation indicating anything less than full disclosure of all relevant facts. The converse is true of the instant complaint. The only facts in common between these two cases are the existence of a margin agreement and a claim for relief under Rule 10b-5. Shearson seems to conclude that these two aspects are sufficient to make *Shemtob* the rule of this case as far as the February-May violation is concerned. *Shemtob* turns not on the existence of a margin agreement but on a lack of scienter. Indeed scienter or its equivalent is negated under *Shemtob* in Paragraphs 17, 18 and 19 of that complaint. Shearson's brief ignores all of this and by dint of pure repetition of selected quotes, divorced from the facts which give rise to them, tries to restate *Shemtob* into holding that because a

margin agreement gives wide discretion in setting margin requirements that there is never any possible cause of action under Rule 10b-5 concerning it. This argument while convenient for Shearson is obviously erroneous. The discretion granted in Clause (5) of the margin account is the authority to require more margin than required by an exchange — not less, i.e. house margin. While the agreement also grants the authority to call a loan by liquidation at any time, it does not abrogate NYSE Rule 431, and such a liquidation would still leave a customer with at least 25% of his account's value. The *Shemtob* plaintiffs waived even this protection by indicating on May 4, the scheduled sell-out date, that they wanted "to ride the market down", and because they were fully aware at all times of their actual margin status and could have ordered a liquidation at any time if they wished. *There can be no fraud if both parties are fully informed of all of the relevant facts.*

Thus, the emphasis in Shearson's brief on the contract and its terms is entirely misplaced, it is not the margin agreement but the negation of scienter in the allegations which are controlling in *Shemtob.* Plaintiff has demonstrated at length that it has pleaded scienter (see plaintiff's principal brief at pages 36-38). As the quick summary in the paragraph immediately above indicates, the factual differences respecting this crucial element are telling.

Under Count Six plaintiff has pleaded two distinct violations of 10b-5 establishing that "consolidation" and "transfer" involve purchases and sales: that the facts underlying the violations of other Rules and regulations also support a violation of Rule 10b-5, that a failure to disclose those violations is a 10b-5 violation and that even in the best light Shearson was an aider and abettor, if not a primary participant, in the scheme to consolidate and transfer improper accounts.

Under Count 10 plaintiff has pleaded two other distinct violations of Rule 10b-5, one of which has been ignored by

Shearson and the other which is not based on facts similar enough to the *Shemtob* case, Shearson's sole basis for objection, to have *Shemtob* control.

Under both Counts 6 and 10 plaintiff has pleaded facts constituting scienter or its equivalent. Accordingly, plaintiff is entitled to reversal of the District Court's decision encompassed by this Point IV.

POINT V

The Order and Judgment of the District Court are final, appealable and fully reviewable by this Court.

Solely through inadvertence of counsel, the original order of the court below dismissing all claims of plaintiff against Shearson did not contain, as Shearson points out, the certificate under Rule 54 (b) of the Federal Rules of Civil Procedure, nor was there final judgment entered. However, as soon as this deficiency was called to the attention of counsel and the court the certificate was granted *nunc pro tunc* certifying that there is "no just reason for delay" and making the court's original order final as between the parties to this appeal. Both parties to this appeal have stipulated that the *nunc pro tunc* certificate and final judgment should be made a part of the record for all purposes. The original omission of the court below to issue a Rule 54(b) certificate is a curable irregularity and where that irregularity has been corrected prior to consideration by the Appellate Court it is preferred practice and in the interests of justice for the Appellate Court to hear the appeal on the corrected record. *Norris Manufacturing Co. v. R. E. Darling Co., Inc.*, 315 F.2d 633 (4th Cir. 1963) and *Vale v. Bonnett*, 191 F. 2d 334 (D.C. Cir. 1951).

It is true that in order to prevent "piecemeal" review of interlocutory and non-final orders of the courts below, 28 U.S.C. 1291 provides that the Court of Appeals shall have jurisdiction to review only "final decisions", such a rule, if carried to logical

extreme, may do intolerable hardship or injustice which would be alleviated by an immediate appeal. This is especially true of the case at bar in which the order and judgment are in every sense "final" as to the parties involved although they may not fit neatly into the rule of 1291 and the cases construing it. Recognizing this, Rule 54 (b) has been amended several times to provide relief for those cases where immediate appeal would be in the interest of justice. The 1961 amendment of the Rule specifically provided for appeal upon certification of the lower court where all issues had been determined against fewer than all of the parties, such as in this case. (See notes of Advisory Committee on Rules, 1961 Amendment, Fed. Rules Civ. Proc. rule 54, 28 U.S.C.A. 247.) Accordingly, this court has consistently reviewed orders dismissing the complaint of plaintiffs as to fewer than all of the parties when certified under Rule 54 (b). See *Farrell v. Piedmont Aviation, Inc.*, 411 F. 2d 812 (2d Cir. 1969), *D'Ippolito v. Cities Service Co.*, 374 F. 2d 643 (2d Cir. 1967) and *Waldron v. Cities Service Co.*, 361 F. 2d 671 (2d Cir. 1966).

Although the granting of the certificate by the court below is reviewable, that review should only be exercised where the court below has clearly abused its discretion. Indeed, of the four cases cited by Shearson in support of its claim that the District Court abused its discretion, only two of them so found, and both of them (*Campbell* and *Panchinella*, cited on page 8 of Shearson's brief) involved situations quite distinguishable from the present case. Both were simple negligence cases, one (*Panchinella*) involving a third party claim, the appeal of which the court said might well become moot if the plaintiff did not recover against the first party defendant and the other (*Campbell*) involving multiple defendants none of whom plaintiffs could identify as the tortfeasor.

The real test established by this court in *Campbell* with respect to reviewing the propriety of issuing the Rule 54 (b) certificate is whether there would "... be some danger of hard-

ship or injustice through delay which would be alleviated by immediate appeal." *Campbell v. Westmoreland Farm Inc.*, 403 F. 2d 939, 942 (2d Cir. 1968). In the present case such hardship would be enormous and such injustice would be intolerable. If, as plaintiff claims, he has or can under the facts alleged state proper causes of action against Shearson the present dismissal of his complaint against that defendant will cause him to pursue his remedies against the several defendants on an interim basis in two separate places: against Shearson in arbitration and against the remaining defendants in District Court. This would cause the plaintiff enormous additional expense, duplicate the discovery procedures necessary (limited as they may be in arbitration), and necessitate not one but two trials eventually. As the court below recognized when it issued the certificate under Rule 54(b), in the words of this court:

> "there is no reason why this appeal should be withheld during the pendency of the suits against the . . . remaining defendants which may not be fully disposed of for several years." *Waldron v. Cities Service Co., Inc.*, supra, at page 672.

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